

STATE OF MICHIGAN
COURT OF APPEALS

ROGER ALLISON and AMY L. ALLISON,

Plaintiffs-Appellants,

v

KENNETH YOUNG and PENNY GELANDER,
a/k/a PENNY YOUNG,

Defendants-Appellees.

UNPUBLISHED

March 1, 2007

No. 271407

Washtenaw Circuit Court

LC No. 05-000551-CZ

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs purchased a home from defendants and subsequently discovered that three of the basement walls and a foundation wall were badly water damaged and needed to be replaced. Plaintiffs brought this action against defendants, asserting various different theories of liability, each of which was factually based on defendants' failure to disclose the condition of the walls on a seller's disclosure statement that defendants provided before the sale.¹ Defendants moved for summary disposition, arguing in part that there was no genuine issue of material fact that they had knowledge of the condition of the walls. The trial court agreed and granted defendants' motion.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although defendants requested summary disposition under both MCR 2.116(C)(8) and (10), it is apparent that the trial court considered evidence beyond the pleadings and, therefore, granted the motion under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v*

¹ Defendants indicated on the disclosure form that there had been evidence of water in the basement, but explained that it could be corrected by keeping the gutters and drain near the basement door free of leaves.

Robertson, 212 Mich App 45, 48; 536 NW2d 834 (1995). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

A review of defendant's motion reveals that defendants sought summary disposition on the ground that there was no evidence that defendants were aware of the problems with the walls. Thus, we find no merit to plaintiffs' argument that this ground was not raised by defendants or that they were caught off guard when the trial court granted summary disposition on this basis. We also find no merit to plaintiffs' argument that defendants were not entitled to summary disposition because they failed to support their motion with citation to proper legal authority. Although the legal authority cited in defendants' brief was sparse, the basis for defendants' motion was primarily factual, not legal. All of plaintiffs' claims were premised on their factual allegation that defendants failed to disclose known defects with the condition of the basement walls.

Relying on *Bergen v Baker*, 264 Mich App 376; 691 NW2d 770 (2004), plaintiffs principally argue that they were entitled to rely on defendants' seller's disclosure statement to support their claim that defendants were aware of the defects with the walls. In *Bergen*, the Court noted that a seller is obligated to disclose known conditions of property under MCL 565.956 and MCL 565.957(1). *Id.* at 383-385. In that case, the plaintiffs presented evidence establishing a genuine issue of material fact whether the defendants misrepresented or failed to disclose a known condition.

In this case, plaintiffs failed to produce any legally admissible evidence that defendants were aware of the alleged defects with the basement walls. Although plaintiffs asserted that William Yadlosky had previously inspected the property in 1994 and advised defendants of the problems with the basement walls, plaintiffs did not submit any documentary evidence to factually support this claim. Where an opposing party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999); *Bergen*, *supra* at 381.

Furthermore, Yadlosky's untimely affidavit, which plaintiffs submitted in support of their motion for reconsideration, did not establish a genuine issue of material fact with regard to whether defendants had knowledge of the defective walls. Yadlosky averred that he inspected the property in the mid-1990s and discovered that the basement walls were structurally deficient. He stated that he advised a realtor of the condition, but there was no evidence that the realtor was associated with defendants. Further, there were no allegations in Yadlosky's affidavit that he was either retained by or personally informed defendants of the condition of the walls. Indeed, it is not even apparent from Yadlosky's affidavit that defendants were the owners of the property at the time of Yadlosky's inspection. Yadlosky stated that he inspected the property in 2004 and had inspected it previously approximately ten years earlier. According to defendants' affidavit, defendants purchased the property in 1995 and sold it in 2002. Thus, Yadlosky's affidavit failed to establish a genuine issue of material fact whether defendants had knowledge of the earlier inspection.

Furthermore, plaintiffs' affidavit in which they averred that Yadlosky told them that he previously advised defendants of the defective condition of the walls was not sufficient to avoid

summary disposition. Yadlosky's alleged statement to plaintiffs is inadmissible hearsay, which does not create a genuine issue of fact. *McCallum v Dep't of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992).

Because plaintiffs failed to establish a genuine issue of material fact with regard to whether defendants had knowledge of the defective condition of the basement walls, the trial court properly granted defendants' motion for summary disposition. Further, plaintiffs' motion for reconsideration failed to demonstrate a palpable error by the trial court and, accordingly, the court did not abuse its discretion in denying the motion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder